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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4105

LEO O. ROBINSON, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

BARTLEY, *Judge*: Veteran Leo O. Robinson appeals through counsel a September 8, 2015, Board of Veterans' Appeals (Board) decision denying an effective date earlier than April 1, 1997, for the assignment of a 40% disability evaluation for service-connected postoperative residuals, right humerus fracture and rotator cuff tear with degenerative changes (right shoulder disability), on the basis that the failure of an April 1946 VA regional office (RO) decision to assign a 40% evaluation for the right shoulder disability was clear and unmistakable error (CUE). Record (R.) at 2-14. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will affirm the September 2015 Board decision.

I. FACTS

Mr. Robinson served on active duty in the U.S. Army from June 1943 to April 1946, participating in battle in the Pacific Theater of Operations. R. at 123, 2420. Service medical records (SMRs) show that on July 9, 1944, while he was serving on Guadalcanal, the jeep in which he was riding overturned; he sustained a moderately severe right shoulder "contusion" and was admitted to

a station hospital. R. at 2130, 2133. He was discharged nine days later still complaining of right shoulder stiffness, but x-ray results were negative and range of motion was normal. R. at 48, 2141-42; *see also* R. at 53, 189. In September and December 1944 SMRs, Mr. Robinson complained of recurrent right shoulder pain since the accident. R. at 203, 2097.

In September 1945, he presented at a station hospital with "chronic pain" in the right shoulder, but full range of motion was observed. R. at 2475. X-ray reports indicated calcification in the right sub deltoid region and "some irregularity of bone at the junction of the superior margin of the greater tuberosity [and at] the head of the humerus[,] with an adjacent calcific fleck consistent with calcification in the supraspinatus tendon at its insertion"; chronic bursitis¹ of the right sub deltoid was diagnosed. R. at 82, 192, 2475, 2477. Right shoulder pain complaints continued into October 1945, and x-rays showed a "tiny calcification at the tuberosity of the humerus" but suggested "no other pathology." R. at 2392. The bony extosis was excised from the humerus head that December. R. at 2446.

A January 1946 SMR indicated that Mr. Robinson continued to complain of right shoulder pain, R. at 2506; another January 1946 SMR noted right shoulder inward rotation limited to 15 degrees, R. at 181. As of February 1946, all right shoulder motion was "normal in range" and shoulder strength was "[p]ractically normal," despite "some pain." *Id.* February 1946 x-rays identified a "small irregular indentation at the greater tuberosity, . . . probably due to an old chipped tear of the supraspinatus [muscle]." R. at 162; *accord* R. at 161. March 1946 x-rays showed a minimal defect at the upper end of the right humerus neck, possibly post-traumatic in nature, but of "doubtful clinical significance"; otherwise x-rays showed a normal right shoulder and no sign of arthritis or bursitis. R. at 163. *But see* R. at 43 (March 1946 clinical record diagnosing chronic right shoulder osteoarthritis). March and April 1946 progress reports noted complaints of pain and soreness and observed marked weakness but found full range of motion; given these symptoms, it was determined that Mr. Robinson could no longer perform a full day's military duty and discharge was recommended. R. at 2469, 2493-94.

¹ A "bursa" is "a sac or saclike cavity filled with a viscid fluid and situated at places in the tissues at which friction would otherwise develop." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 262 (32d ed. 2012) [hereinafter DORLAND'S]. Bursitis of the shoulder, also called scapulohumeral bursitis or calcific tendinitis, is the "inflammation and calcification of the subacromial or subdeltoid bursa, resulting in pain, tenderness, and limitation of motion in the shoulder." *Id.* at 1881.

In April 1946, Mr. Robinson was discharged based on an Army medical board diagnosis of chronic traumatic moderate right shoulder synovitis,² linked to the July 1944 jeep accident. R. at 2420. That same month, he sought service connection for a right shoulder disability, R. at 76-77, 2455-56. On April 29, 1946, VA granted a 20% evaluation effective the day following separation from service for "synovitis, right shoulder, secondary to chip fracture right humeral head," under Diagnostic Code (DC) 1639 of VA's 1933 Schedule for Disability Ratings, R. at 2295; *see* R. at 2299. A February 1947 VA decision found no change in the level of disability.³ R. at 87, 2238, 2241. The veteran did not appeal either of these decisions and they became final. R. at 4.

More than three decades later, a June 1978 VA hospital summary revealed a diagnosis of right shoulder rotator cuff tear due to Mr. Robinson's July 1944 in-service injury and indicated that he underwent surgery to repair the disability. R. at 2010-11. In May 1998, the RO assigned a 100% evaluation from February 7, 1997, to March 31, 1997, based on a period of convalescence, and a 40% evaluation thereafter for postoperative residuals of right humerus fracture and rotator cuff tear with degenerative changes.⁴ R. at 1742, 1745-47. The veteran timely disagreed with this decision, R. at 1709-11, and the RO continued the 40% evaluation, R. at 1689-91, 1699-1708. In lieu of a Substantive Appeal, the veteran filed a letter stating that he believed he was entitled to an earlier effective date for the 40% evaluation, R. at 1683-85; but the RO continued the April 1, 1997, effective date, R. at 1616-21; and he appealed to the Board, R. at 1345-46. In September 2000, the Board denied an earlier effective date, R. at 1250-68, and this Court affirmed that decision, R. at 1062-79.

In January 2005, Mr. Robinson filed through counsel a CUE motion that did not specify the prior decision it was challenging, R. at 1057-60, but which the RO interpreted as challenging May and October 1998 rating decisions; the RO denied the motion, R. at 1015-23. The veteran timely

² "Synovitis" is inflammation of a synovium (membrane); it is usually painful, particularly on motion, and is characterized by a fluctuating swelling due to effusion within the synovial sac. *See* DORLAND'S at 1856.

³ This review was precipitated by a June 1946 statute in which Congress directed that any disability compensation or pension claim covering a period before or after April 1, 1946, be evaluated under the 1945 revised Schedule for Disability Ratings. Act of June 27, 1946, Pub. L. 79-458, 60 Stat. 319, 319-20; *see* R. at 2241. Given the substantial similarity between the 1933 and 1945 rating schedules, the analysis in Part II, *infra*, would apply with equal force even if the RO in April 1946 had evaluated the right shoulder disability under the 1945 rating schedule.

⁴ It is not clear from the record what Mr. Robinson filed that prompted this RO action.

disagreed with this decision, and clarified that he was specifically alleging CUE in the disability evaluation assigned in the April 1946 RO decision. R. at 999-1002. In a May 2007 Statement of the Case, the RO recharacterized the issue as whether there was CUE in the April 1946 RO decision but denied the motion. R. at 833-49. That same month, he appealed the May 2007 determination to the Board and requested an expedited hearing, as he was 85 years old at the time. R. at 797-802. Meanwhile, in June 2007, in response to an April 2007 CUE motion not in the record, the Board found no CUE in its September 2000 decision denying an effective date earlier than April 1, 1997, for the assignment of a 40% right shoulder evaluation.⁵ R. at 762-64.

Mr. Robinson ultimately testified at a Board hearing, but this was not provided until February 2015. R. at 2507-32. As the Board later stated, for some reason the RO did not treat or recognize the veteran's May 2007 filing as a timely Substantive Appeal until July 2014, whereupon it certified the appeal to the Board. *See* R. at 5.

In the September 2015 decision on appeal, the Board found no CUE in the April 1946 RO decision assigning a 20% evaluation for the right shoulder disability and, hence, denied entitlement to an effective date earlier than April 1, 1997, for a 40% evaluation for that condition. After extensively reviewing the evidence of record and the law in effect at the time of the April 1946 RO decision, the Board determined that the "overwhelming majority" of evidence at the time showed Mr. Robinson's right shoulder disability was "moderate," that rotator cuff problems had not been identified, and that the evaluation criteria of the time did not explicitly discuss painful motion and *DeLuca v. Brown*, 8 Vet.App. 202 (1995), had not yet been decided. R. at 7-13. Having determined that there was a plausible basis in the record for assignment of a 20% evaluation, the Board concluded that there was no undebatable error in the April 1946 RO decision that, if corrected, would have manifestly led to a different result. R. at 4, 13-14. This appeal followed.

⁵ Given that the September 2000 Board decision was directly appealed to, and affirmed by, this Court, the Board did not have the authority to later consider whether there was CUE in that decision and should have dismissed rather than adjudicated the April 2007 CUE motion. *See* 38 C.F.R. § 20.1400(b)(1) (2016) ("All final Board decisions are subject to revision under this subpart except: Decisions on issues which have been appealed to and decided by a court of competent jurisdiction.").

II. ANALYSIS

Mr. Robinson argues that the Board erred in finding that the April 1946 RO decision did not contain CUE because that RO decision failed to fully account for all of his disability symptoms, such as pain and limitation of motion; failed to evaluate him for a right shoulder rotator cuff tear or other right shoulder disabilities; and failed to apply *DeLuca* retroactively. He further argues that the Board should have recognized that VA failed to timely adjudicate his CUE motion and delayed resolution of this matter for many years and asserts that this violated his constitutional right to due process. Appellant's Brief (Br.) at 2-28; Reply Br. at 1-7. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 10-23.

When a prior final RO or Board decision contains CUE, that decision may be reversed or revised. 38 U.S.C. §§ 5109A, 7111; *see DiCarlo v. Nicholson*, 20 Vet.App. 52, 54-58 (2006); 38 C.F.R. §§ 3.105, 20.1400-.1411 (2016). CUE is established when the following conditions have been met: (1) Either the correct facts as they were known at the time were not before the adjudicator, the adjudicator made an erroneous factual finding, or the statutory or regulatory provisions extant at the time were incorrectly applied; (2) the alleged error is "undebatable," not merely a "disagreement as to how the facts were weighed or evaluated"; and (3) the error "manifestly changed the outcome" of the prior decision. *Russell v. Principi*, 3 Vet.App. 310, 313-14, 319 (1992); *see King v. Shinseki*, 26 Vet.App. 433, 439 (2014); *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); *see also Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999). In other words, "CUE is a very specific and rare kind of 'error' . . . of fact or law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993).

The Court's overall review of a Board decision finding no CUE in a prior, final RO decision is limited to determining whether the Board's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261(a)(3)(A), and whether it was supported by an adequate statement of reasons or bases on all material issues of fact and law, 38 U.S.C. § 7104(d)(1). *See Cacciola v. Gibson*, 27 Vet.App. 45, 59 (2014); *King*, 26 Vet.App. at 439. The different elements that lead to a valid CUE finding, however, are subject to review under the standards applicable to each element. *Hopkins v. Nicholson*, 19 Vet.App. 165, 167 (2005). The determination of the proper disability evaluation is a factual question that the Court reviews under

the "clearly erroneous" standard. *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997); see *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (defining the "clearly erroneous" standard).

In the present case, the April 1946 RO decision did not explain its reasons for assigning a 20% evaluation for the right shoulder disability, but such explanation was not required before February 1990 and, in any event, inadequate reasons or bases cannot constitute CUE. See *Dolan v. Brown*, 9 Vet.App. 358, 362 (1996) ("It was not until February 1990 that ROs were required by statute to include the reasons for denying a claim in their decisions."). Rather, "to establish CUE in a pre-February-1990 RO decision, it must be clear from the face of that decision that a particular fact or law had not been considered in the RO's adjudication of the case," *Joyce v. Nicholson*, 19 Vet.App. 36, 46 (2005), or that the RO made a clearly and undebatably erroneous factual finding, see *Bouton v. Peake*, 23 Vet.App. 70, 73 (2008).

At the time of the April 1946 RO decision in this case, disability evaluations were assigned pursuant to the 1933 VA Schedule for Rating Disabilities. DC 1639 instructed that synovitis be evaluated as for bursitis, the DC for which, in turn, instructed that the body part affected be "rate[d] for the mild or moderate forms of arthritis, with due regard for comparable ratings for limitation of motion in the joints involved." VA SCHEDULE FOR RATING DISABILITIES 62 (2d ed. 1933) [hereinafter 1933 VA SCHEDULE]. DC 1138 provided the following evaluations for hypertrophic chronic arthritis: 10% for "[m]ild," 20% for "[m]oderate," and 40% for "[s]evere." *Id.* at 61. That DC further provided that disability evaluations in excess of 40% "will be justified only in proportion to impairment of joint function (ankylosis, limitation of motion, or painful motion) of the several joints." *Id.* "With demonstrable pathology, such as joint or periarticular change, 'painful motion' may be recognized to the extent of the minimum pensionable rating for the joint." *Id.* Relevant DCs specifically addressing limitation of motion of the major—here, the right—shoulder provide a 20% evaluation for limitation of motion at the shoulder level (DC 1795); a 30% evaluation for limitation of motion midway between the side of the body and shoulder level, or for "marked loss in outward and inward rotation" (DC 1931); and a 50% evaluation for limitation of motion to 25 degrees from the side of the body (DC 1932). *Id.* at 12. Preceding the table of DCs, the 1933 VA Schedule advised that evaluation of disability in the joints is to be based as far as possible on recognition of the following factors: less motion than normal, more motion than normal, weakened motion, excess fatigability, excess coordination, and pain on movement. *Id.* at 9.

Mr. Robinson contends that the relevant record is replete with evidence of pain and that the Board ignored this evidence in its analysis. Appellant's Br. at 17-18. Initially, the Court notes that the Board decision on appeal extensively recited the evidence before the RO in April 1946, including every complaint of pain listed in the veteran's brief. R. at 7-9; *see* Appellant's Br. at 17-18 (listing incidents of pain, which the Board discussed). Moreover, the Board observed that rating criteria at the time contemplated painful motion and stated that painful motion should be entitled to the minimum compensable evaluation. R. at 13. Because the veteran was in receipt of a disability evaluation in excess of the compensable minimum, the Board concluded that the April 1946 RO decision considered pain. *Id.*

The terms "moderate" and "severe" used in DC 1639 to respectively describe the criteria for 20% and 40% evaluations were not defined. The Court has noted that terms such as "moderate" and "severe" used in VA's disability rating schedule do not convey unified, objective meanings but will vary depending on the context of specific DCs. *See Prokarym v. McDonald*, 27 Vet.App. 307, 310 (2015) ("'[S]evere' is a degree descriptor specific to the listed disability, and disabilities designated as 'severe' in different DCs are not necessarily equally disabling."). Given that the terms "moderate" and "severe" in this context do not provide objectively ascertainable criteria, that the RO in April 1946 was not required to explain them as part of its adjudication, and that there is no clear indication that the RO did not consider pain when assigning a 20% evaluation, the Court cannot find clearly erroneous the Board's determination that the April 1946 RO decision considered pain when it assigned a 20% evaluation, in accordance with the guidance in the 1933 VA Schedule. *See Nicholson*, 19 Vet.App. at 46; *Johnston*, 10 Vet.App. at 84; *Dolan*, 9 Vet.App. at 362.

Relatedly, Mr. Robinson argues that *DeLuca* is retroactively applicable to the April 1946 RO decision and that the RO's failure to consider the effect of pain on limitation of motion was CUE. Appellant's Br. at 11-13. The Board appeared to reject the applicability of *DeLuca* to the April 1946 RO decision, observing that the case was not decided until 1995. R. at 13. When a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Jordan v. Nicholson*, 401 F.3d 1296, 1298-99 (Fed. Cir. 2005); *see also Threatt v. McDonald*, 28 Vet.App. 56, 63 (2016) (noting the "normal principle at this Court that judicial decisions operate retrospectively").

However, a CUE motion is not a direct appeal but a collateral attack on a prior final decision. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 696-98 (Fed. Cir. 2000). And CUE "does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." 38 C.F.R. § 20.1403(e) (2016). Thus, the Court has held, for example, that an interpretation of a regulation announced in a 1993 case could not be used to establish that any error in a 1957 VA adjudication was CUE. *Lamb v. Peake*, 22 Vet.App. 227, 234-35 (2008); *see Jordan v. Nicholson*, 401 F.3d 1296, 1299 (Fed. Cir. 2005) (holding that § 20.1403(e) proscribed a finding of CUE in a 1983 Board decision's application of a regulation, even when that regulation was subsequently found invalid in 2004).

Here, Mr. Robinson's retroactivity argument fails to acknowledge that the Board's review of a CUE motion must consider only the law in effect at the time, *see Russell*, 3 Vet.App. at 313-14, and that *DeLuca*'s holding—that DCs based on limitation of motion of the musculoskeletal system do not subsume factors such as pain on movement and that VA examinations must, if possible, opine as to whether factors such as pain on movement effect additional range of motion limitation—was an interpretation of DCs and regulations that was not announced until 1995, several decades after the April 1946 RO decision at issue. Accordingly, the Court concludes that the Board did not err in not finding CUE based on the non-retroactive application of *DeLuca*.⁶

Likewise, to the extent that Mr. Robinson argues that the RO in April 1946 committed CUE when it failed to award an evaluation in excess of 20% under DC 1138 or under DCs pertaining to the right shoulder based on limitation of motion, the Court is not persuaded. For the reasons already discussed, the Court cannot say that the evidence of record in April 1946 clearly and undebatably established that limitation of right shoulder motion was "severe" under DC 1138. The Board found that "the degree of limitation of motion of the right shoulder to warrant ratings under [DCs] 1795, 1931, and 1932 was not shown in the record in April 1946." R. at 12. The Court discerns no clear

⁶ Alternatively, even if the Court were to assume that it would have been error for the RO in April 1946 not to apply to its adjudication the principles announced in *DeLuca*, there is no undebatable evidence that the RO failed to account for pain in assigning a 20% evaluation for the right shoulder disability. There was no medical evidence of record in April 1946 opining, in terms of additional limitation of motion, the disabling effect of pain. VA's failure to obtain such evidence, at most, amounts to a violation of the duty to assist, which cannot form the basis of a successful CUE challenge. *See Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (en banc); *Robertson v. Shinseki*, 26 Vet.App. 169, 175-76 (2013).

error in this finding. Mr. Robinson cites several pieces of evidence before the RO in April 1946 that he argues showed limited motion, but none of the SMRs he mentions clearly showed limitation of motion that would meet the criteria of DCs discussed by the Board pertaining to the shoulder. *See* 1933 VA SCHEDULE at 12. The only SMR specifying limitation of motion is a January 1946 notation of inward shoulder rotation limited to 15 degrees. R. at 181. But the Court cannot conclude that such limitation amounts undebatably to "marked loss" in inward right shoulder rotation under DC 1931.⁷

Finally, Mr. Robinson argues that there was CUE in the April 1946 RO decision because the RO failed to evaluate him for multiple right shoulder conditions, particularly right rotator cuff tear, which could have been diagnosed based on medical treatises available at the time. Appellant's Br. at 12, 19-20. These arguments are not availing. The veteran notes that, at various times, synovitis, bursitis, and arthritis were diagnosed in SMRs, but he was not diagnosed with all three at the same time; and he has offered no basis to believe that he had three distinct conditions simultaneously or that under the law in effect in April 1946 these conditions should have been separately considered and assigned distinct disability evaluations. *Cf. Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (stating that the Court reviews the Board's selection of a DC for arbitrariness under section 7261(a)(3)(A)). Indeed, the April 1946 Army medical board report diagnosed Mr. Robinson only with synovitis, and the 1933 VA Schedule instructed adjudicators to evaluate synovitis as bursitis and bursitis as arthritis, suggesting that the disabling effects or symptoms of each are duplicative. 1933 VA SCHEDULE at 62. Nor has he demonstrated that his right shoulder contusion or humerus head chip or calcification manifested symptoms not contemplated by the 20% evaluation or would have been entitled in April 1946 to separate disability evaluations.

As for a right rotator cuff tear, Mr. Robinson does not assert that such diagnosis was of record at the time of the April 1946 RO decision; rather, he contends that evidence of record "would have led any reasonable person to recognize that [he] had a rotator cuff tear." Appellant's Br. at 10. However, an allegation of CUE "must . . . [be] based upon the evidence of record at the time of the original decision," *Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (en banc). Of record in April 1946 were two references to an "old" tear in the supraspinatus muscle. A January 1946 x-ray

⁷ The veteran asserts that an April 1948 VA examination report showed right shoulder motion limited to 45 degrees, but, not only does this SMR postdate the April 1946 RO decision, but the 45 degree notation refers to a right eye strabismus; the SMR specifically notes that the right shoulder disability caused "no limitation of motion." R. at 75.

report stated that there was a small calcification at the tuberosity of the humerus that "may have been the result of an old tear in the supraspinatus muscle." R. at 161. A February 1946 x-ray report stated that a small irregular indentation at the greater tuberosity was "probably due to an old chipped tear of the supraspinatus [muscle]." R. at 162. Although the VA rating schedule at the time of the April 1946 RO decision provided disability compensation for supraspinatus muscle injuries, *see* 1933 VA SCHEDULE at 17-18 (DC 3166, providing evaluations for slight, moderate, moderately severe, or severe injuries to the "[i]ntrinsic shoulder girdle muscles," which include the supraspinatus muscle), the January and February 1946 SMRs did not specify that the "old" tear in the supraspinatus muscle was related to the July 1944 jeep accident or any other in-service event. Accordingly, regardless of post-April 1946 diagnoses, these SMRs do not undebatably establish that the RO overlooked a right shoulder rotator cuff tear. A new medical diagnosis that "corrects" an earlier diagnosis relied on by adjudicators in a prior final decision is not the kind of "error" that could constitute CUE. *See Russell*, 3 Vet.App. at 314; *see also* 38 C.F.R. §§ 3.105(d); 20.1403(d)(1). The Court cannot say that the RO's failure in April 1946 to evaluate other right shoulder problems instead of or in addition to synovitis under DC 1639, if error, was an undebatable error that, if avoided, would have resulted in an evaluation in excess of 20%.

Having fully considered the evidence of record and the veteran's arguments, the Court finds that the Board's determination—that there was not an undebatable error in the April 1946 RO decision that would have manifestly changed the outcome of that decision—was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and was supported with adequate reasons or bases. *See Cacciola*, 27 Vet.App. at 59; *King*, 26 Vet.App. at 439.

Before concluding, the Court notes Mr. Robinson's criticism of VA for its failure to timely process his appeal of the CUE matter to the Board. Appellant's Br. at 24-27. Although the veteran timely filed a Substantive Appeal as to the RO's May 2007 determination that there was no CUE in the April 1946 RO decision, R. at R. at 797-802, the RO failed to recognize and treat this filing as an appeal until August 2014, R. at 5. There is no explanation for this delay of more than seven years in processing and adjudicating this World War II veteran's CUE appeal, and the Court well understands the basis for Mr. Robinson's belief that VA was "dragging out his case until he die[d]." R. at 801. Such dilatory treatment of any veteran's appeal is unacceptable; it is especially egregious

in the case of a World War II combat veteran who requested expedited docketing based on advanced age.

But, although the Court sympathizes with the veteran's frustration and finds VA inaction in this case inexcusable, his due process argument fails. Even assuming that VA's handling of Mr. Robinson's May 2007 appeal amounted to a deprivation of due process guaranteed by the Fifth Amendment to the U.S. Constitution, such error was ultimately harmless. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Gambill v. Shinseki*, 576 F.3d 1307, 1311 (Fed. Cir. 2009) (holding that alleged violations of constitutional due process are subject to a prejudicial error analysis and may be deemed harmless). Despite the unjustified delay in processing his appeal, Mr. Robinson was afforded an opportunity to testify at a February 2015 Board hearing with counsel present. R. at 2507-32. The Board issued the decision currently on appeal six months later, R. at 2-14, and, as explained in the foregoing analysis, the Court discerns no error in the Board's finding of no CUE in the April 1946 RO decision assigning a 20% evaluation for a right shoulder disability. Accordingly, Mr. Robinson has not shown that he was prejudiced by any due process violation VA may have committed. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination").

III. CONCLUSION

Upon consideration of the foregoing, the September 8, 2015, Board decision is AFFIRMED.

DATED: November 29, 2016

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